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IN THE

Supreme Court of the United States

October Term, 1962

No. 739

MILTON MAY, *Petitioner*

v.

THE CHASE MANHATTAN BANK, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Milton May, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on November 29, 1962.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals, printed in the Appendix hereto, is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 29, 1962. The jurisdiction was invoked

because of diversity of citizenship, the plaintiff, The Chase Manhattan Bank, being a corporation of the State of New York, and the defendant, Milton May, being a citizen of the State of Pennsylvania.

QUESTIONS INVOLVED

1. Whether the parol evidence rule of the State of New York forbids the introduction of oral testimony in a suit by a lender against a guarantor on a written guarantee for loans.

2. Whether the learned trial judge in the District Court improperly granted a motion for a directed verdict after hearing oral evidence which varied or was a condition precedent to the effectiveness of the written guarantee.

3. Whether the learned trial judge (a) improperly adduced testimony from a witness in the absence of the jury (b) required the guarantor to prove negligence with records of the lender which the guarantor did not desire to use.

STATUTE INVOLVED

The statutory provisions involved are Sec. 33-c of the New York Personal Property Law, 40 Consolidated Laws, McKinney 1962, which is printed in the Appendix hereto, page 10.

STATEMENT

Petitioner, Milton May (May) was the controlling stockholder of States Grain Corporation (States) a New York corporation engaged in grain export, which had a line of credit from $500,000 to $8,000,000 from 1939 to 1957 (17a, 16b) with The Chase National Bank of the City of New York, to which The Chase ManhattanBank is successor, hereinafter termed "Chase" since the succession in no way affects the matter. It was stipulated by the parties that the law of the State of New York shall govern (61a). During the years it was the practice of the parties to loan 90% of the grain collateral offered (32a, 33a). This was also the custom of the trade, but the offer of such evidence was denied (23 a).

In 1947 May was asked by Chase to execute a guarantee of States for secured and unsecured loans (17a, 18a) which was done. In 1950 States executed a General Loan and Collateral Agreement (6 a) which authorized Chase to make both secured and unsecured loans to it. In 1953 May became ill and was totally incapacitated until July, 1957, (54a, 55a) at which time he analyzed States' account with Chase, found it to be overloaned, which Chase did not know, and so advised Chase (28a, 55a). When the grain collateral was sold, States owed Chase about $750,000. The Complaint was filed against May September 19, 1958 in the District Court for the Western District of Pennsylvania. On October 20, 1958, certain securities belonging to May and his wife were deposited with Chase, not as a payment (48b, 49b) but as a pledge, and claimed by May to be to show good faith and for an extension of time, the agreement for which transaction was in three separate writings. An oral agreement with an officer of Chase was entered into, but not put in writing (58b, 59b, 60b) on the said officer's

refusal when the omission was called to his attention (59b).

On August 18, 1959, a reply to the Complaint was filed with a counterclaim for the value of the securities which Chase had bought in at auction for $750,000 or $743,463.52 net (59a, 9b).

At the trial, Judge Willson ruled inadmissible, as violative of the parol evidence rule, all evidence offered on behalf of May to prove that Chase officers did promise May that all States loans would be fully secured (19a) as was the custom of the trade (23a). May asserts the right to prove that the handling of the account, with an elaborate set-up for supervising commodity loan accounts such as here involved (32a, 35a) negligently, or for some other reason, permitted loans in excess of the collateral to the extent of $750,000 and mishandled other documents (28a, 29a), and had this not occurred, there would have been no loss or occasion for the suit. The learned trial judge, under a theory espoused by neither Chase nor May, that evidence of Chase negligence or misconduct might be admissible, insofar as it affected the 1959 auction sale of the May securities did permit testimony to be adduced concerning the Chase handling of the States account, but then, when a dispute arose to certain bank records, the learned trial judge, after sending the jury out of the room, himself called a Chase witness to the stand (40a) and permitted him to repudiate testimony which this same officer had given only several hours before (43a).

Although the opinion of Court below did not specifically refer to the testimony of Milton S. Gould, Esq., or of Samuel Goldfarb, Esq., it appears that their testimony, being contradictory, should have been one of the questions of fact to be decided by the jury. Mr. Gould, called by the plaintiff, testified as to the delivery of the securities to Chase, and the reasons for forbearance by Chase (41b to 53b). Mr. Goldfarb related that the reason for the delivery of the

securities was to keep the case open (55b), to show May's good faith (58b), and although such was not a part of the written agreements, which stated only that the securities were deposited as a pledge of May's guarantee of 1947 (49b, 51b), the words "as a pledge" (46b, 47b) were added at May's insistence on the last written line, and apparently was intended to correct the writing and limit the right of Chase to sell them only after the case had been tried. They were claimed to be worth several millions of dollars (57a, 59a). Instead, Chase sold them over the objection of May, on August 28, 1959 (59a). The case was not tried until December 1, 1961 (1a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, in affirming the judgment of the trial Court, citing *Hicks vs. Bush*, 1962, 10 N. Y. 2nd 488, 180 N. E. 2nd 425, 225 N. Y. S. 2nd 34, distinguished contemporaneous oral agreements which contradicted a written agreement from those which supplement the writing, the latter being admissible. The *Hicks* case is authority that parol evidence is admissible to prove a condition precedent to the writing being effective, if the evidence does not contradict the written agreement. Applied to the instant case, it would allow May to show that the guaranty of 1947 was a binding obligation only if Chase maintained the practice of requiring at least 10% excess collateral over the loan. This was a condition precedent to the right of the bank to maintain its action on the guarantee, and does not contradict the writing. That such a condition precedent existed is evident from the bank's own records (offering sheet for April 1, 1957, (127b) which shows "Margin 10%"). That such was not maintained is evident from the

fact that the States' account was overloaned by more than $700,000, to which May called the bank's attention.

Excellent annotations on the parol evidence rule as applied to written guarantees are set forth in 33 A.L.R. 2nd 960, 89 A.L.R. 1228, sec. 246, as to New York, and in Stearns' The Law of Suretyship, Elder's Revision, Fifth Ed., W. H. Anderson Co., 1951, both of which state that generally the written agreements of every day business are apt not to contain every item intended by the parties at the time, they relying on the custom of the trade and the generally accepted meaning. See also The Parol Evidence Rule, 53 Yale Law Journal 603, (1944) to same effect.

That this principle be argued before this Honorable Court is of far reaching importance and is a reason for granting the writ.

It concerns the interpretation of the New York Personal Property Law, 40 Consolidated Laws, McKinney 1962, para 33c, which is quoted in the opinion on page 4, in particular as to when a written agreement or other instrument cannot be changed by oral executory agreement or oral consent or by oral notice.

2. Another reason for granting the writ is to determine the conflict when it relates to a guarantor. In Restatement, Security 1941 ed. para. 133, Comment a, page 361, there is stated:

> "Where a surety has a defense arising out of a suretyship relation, this is always available against the creditor. Where the creditor is solvent and the surety has a claim available by way of set-off, the ordinary rules of set-off apply unless the interests of third persons are involved."

In the instant case, May counterclaimed for the value of the securities sold, which, it is respectfully submitted,

he had every right to do. These were sold before the trial was held, whereas it was claimed by May that they were to have been held until his liability as guarantor was determined. In losing the securities (listed 58a), he has lost all his various companies, necessary for his business. The instrument of 1947 is a binding contract, unless it be varied by other testimony and other writings, as related by Mr. Goldfarb and Mr. Gould. As stated, this should have been determined by a jury, (a) whether the securities were sold before Chase's right had ripened, and (b) whether there was negligence or other reasons for loaning more than was the practice of the parties, the custom of the trade, and the agreement of the bank's officer, all of which May offered to prove. The Court of Appeals referred to the guarantee, the terms of which were not disputed, nor was May's ultimate liability disputed thereunder. The case referred to in the Court's opinion, *Associated Food Stores, Inc. vs. Siegel*, 1960, 10 App. Div. 2nd 1003, 205 N.Y.S. 2nd 208, modifying 20 Misc. 2nd 952, 193 N.Y.S. 2nd 500, aff'd. 1961 9 N.Y. 2nd 816, 175 N. E. 2nd 343, 215 N.Y.S. 2nd 764, turns on the point whether or not a writing was required to revoke the promise of the guarantor. In the instant case the oral testimony was offered, and the written documents surrounding the delivery of the securities produced to show the time when they were to be used, not whether they were binding.

3. The third reason for granting the writ is to present argument whether the trial procedure of the Court was erroneous, as a guide for future trials. If it be concluded that any of the factual questions should have been decided by the jury, the question of the manner in which it should have been admitted becomes important. Obviously, May cannot prevail in this case by proving Chase should have made only secured loans to States; he must prove that such loans

violated a duty to him, as guarantor. It was to adduce such proof that Mr. Charles A. Ehren, an officer of Chase in the loan department was called by May for cross examination. He was shown a group of sheets marked as Defendant's Exhibit 6, produced in the Appendix (47a) and identified as bank collateral sheets. The witness stated that the valuations of grain on these sheets were made by Chase and not by the borrower, States (38a), and that it would be "very unusual" for valuations to remain unchanged (39a). It had been shown that the valuations on these sheets were identical to valuations suggested by the borrower (34a). Although neither party suggested that the jury be removed from the room, the learned trial judge ordered this (39a, 40a) and recalled Mr. Ehren to the stand. Mr. Ehren then made statements contradictory to his earlier statements and he and Judge Willson disputed May's counsel that these were contradictory. The earlier record was read back and it disclosed the contradiction (41a, 42a, 43a). The Court then permitted the witness, in repudiation, to testify that there were other records of Chase which were used in his department, and were of two types, one of which was not produced in court, presumably destroyed, and the other which was in court. The learned judge thereupon ruled that he would permit May's proof in this area only if it were based on all the available bank records (44a, 45a). It is submitted that such procedure deviated so far from sound trial procedure as to call for guidance by this Court. The credibility of a witness should be determined by the jury, and testimony given in its hearing. What practice requires a party to introduce all records when some are inconsistent, or missing? Certainly this Court should set the pattern for proper procedure, so that such a burden should not be imposed on only one of the parties in the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LANDON GERALD DOWDEY
ALEXANDER SIMPSON BAUER

APPENDIX "A"

Section 33-c of the New York Personal Property Law, 40 Consolidated Laws, McKinney 1962, §33-c, which reads as follows:

"§33-c. *When written agreement or other instrument cannot be changed by oral executory agreement, or discharged or terminated by oral executory agreement or oral consent or by oral notice.*

"1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 13,919

THE CHASE MANHATTAN BANK

v.

MILTON MAY,

Appellant.

Appeal from the United States District Court for the Western District of Pennsylvania.

Argued October 18, 1962

Before: McLaughlin and Hastie, *Circuit Judges;* and Dumbauld, *District Judge.*

OPINION OF THE COURT

(Filed November 29, 1962)

By HASTIE, *Circuit Judge.*

In the district court, The Chase Manhattan Bank sued Milton May on his guaranty of certain loans and recovered. May has appealed.

The suit is within federal jurisdiction solely because of diversity of citizenship. The parties properly recognize that the contacts of the relevant transactions with New York are such that New York law controls contested legal issues concerning the reach of the parol evidence rule and the validity of alleged oral modifications of a written guaranty.

The circumstances of the original contracting are undisputed. May was the organizer and majority shareholder of States Grain Corporation, which engaged in the buying and selling of grain. Beginning in 1940 and thereafter in the normal course of business, the corporation financed many of its transactions by borrowing from The Chase Manhattan Bank. In 1947, when the corporation's line of credit was substantially increased, May, at Chase's request, personally guaranteed future loans to the corporation. The instrument of guaranty, a form prepared for general use by Chase, comprehensively covered loans "with or without security". Subsequently, the corporation was unable to repay its borrowings, and this suit was filed against May as guarantor for about $700,000, plus interest.

In defending against this claim, May sought to prove that when the guaranty was given the parties understood and Chase orally promised that loans to the corporation would be made only upon adequate security in the form of collateral supplied by the borrower. May also offered to prove a custom of the trade to the same effect. The district court held both lines of testimony inadmissible. The correctness of those rulings is the first question on this appeal.

The New York decisions applying the parol evidence rule distinguish contemporaneous oral agreements contradictory to a written contract from those which supplement the writing. While the latter may be enforceable, it is clear that the former are not. With *Fadex Foreign Trading Corp. v. Crown Steel Corp.*, 1947, 272 App. Div. 273, 70 N.Y.S.2d 892, *aff'd*, 1948, 297 N.Y. 903, 79 N.E.2d 739, and *Ameri-*

can Trust Co. v. Sullivan, 1955, 285 App. Div. 1043, 140 N.Y.S.2d 184, *aff'd*, 1957, 2 N.Y.2d 954, 142 N.E.2d 423, 162 N.Y.S.2d 358, compare *Hicks v. Bush*, 1962, 10 N.Y.2d 488, 180 N.E.2d 425, 225 N.Y.S.2d 34. See also RESTATEMENT, CONTRACTS §240, comment *b*. Recognizing this distinction, appellant argues that the alleged oral understanding between lender and guarantor, that only adequately secured loans would be made, is somehow consistent with the written promise to guarantee both secured and unsecured loans.

But it is not asserted that the alleged oral understanding was an independent contract, a promise supported by its own consideration. The appellant claims merely that an oral assurance that there would be no unsecured loans constituted a defense against the otherwise enforceable contemporaneous written promise to guarantee unsecured loans. Thus analyzed, the offer of proof was an inadmissible parol contradiction of a plain provision of a written contract.

Appellant's reliance upon a usage and custom of requiring security for such loans as these is also misplaced. The New York cases follow the teaching of *Hopper v. Sage*, 1889, 112 N.Y. 530, 535, 20 N.E. 350, 351-52, that "usage and custom cannot be proved . . . to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof". See *Western Union Tel. Co. v. American Communications Ass'n*, 1949, 299 N.Y. 177, 86 N.E.2d 162; *Russell v. Marboro Books*, Sup. Ct. 1959, 183 N.Y.S.2d 8, 18 Misc. 2d 166; *George Colon Contracting Corp. v. Morrison*, Sup. Ct. 1954, 162 N.Y.S.2d 841, 880-81, *aff'd*, 1956, 2 App. Div. 869, 157 N.Y.S.2d 927, *appeal denied*, 1957, 3 App. Div. 690, 158 N.Y.S.2d 797, *appeal denied*, 1957, 2 N.Y.2d 710, 141 N.E.2d 319. Moreover, in this case proof that loans are normally not made without security would not help the appellant. For the existence of such a custom would indicate no

more than that appellant's guaranty expressly covered unusual loans as well as customary ones. Certainly, the guaranty would be no less binding on that account.

Next, even if the oral agreement said to have attended the execution of the guaranty is invalid, appellant argues that the court below erred in excluding testimony concerning alleged subsequent conversations wherein the bank agreed with May that only loans secured by adequate collateral would be made to the corporation.

Relevant to this issue is the following provision of the guaranty itself:

> "This guaranty shall continue in full force and be binding upon the undersigned . . . and the Bank may continue to act in reliance hereon until the receipt by the Bank of written notice from the undersigned . . . not to give further accommodation hereunder."

We think the plain meaning of this provision is that modification or revocation of the guaranty can be accomplished only by an appropriate written communication from the guarantor to the prospective lender.

The legal effect of this stipulation must be determined in the light of Section 33-c of the New York Personal Property Law, 40 Consolidated Laws, McKinney 1962, §33-c, which reads as follows:

> "§33-c. *When written agreement or other instrument cannot be changed by oral executory agreement, or discharged or terminated by oral executory agreement or oral consent or by oral notice.*
>
> "1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is

in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Were this a matter of first impression, it would be arguable that Section 33-c does not cover an instrument of guaranty because such a writing is only a continuing offer capable of ripening into one or more unilateral contracts as credit is subsequently extended to the specified borrower. However, we must be guided by a recent New York case in which both the trial judge and the Appellate Division held that Section 33-c is applicable to a provision of a written guaranty requiring a writing for the modification or revocation of the guarantor's promissory undertaking. *Associated Food Stores, Inc. v. Siegel*, 1960, 10 App. Div. 2d 1003, 205 N.Y.S.2d 208, *modifying* 20 Misc. 2d 952, 193 N.Y.S.2d 500, *aff'd* 1961, 9 N.Y.2d 816, 175 N.E.2d 343, 215 N.Y.S.2d 764. In the cited case the Appellate Division disagreed with the trial judge on the question whether the language of the guaranty there in suit should be interpreted as requiring a writing to revoke the guarantor's promise as well as to modify it. But we have no such problem here. Any oral withdrawal from so much of May's undertaking as covered unsecured loans would be in derogation of his undertaking that his guaranty should "continue in full force" until he should give the bank written notice to the contrary.

One additional point must be considered in connection with a counterclaim May has filed for the value of certain securities he had deposited with Chase. The bank later sold these securities, using the proceeds in partial satisfaction of May's obligation on his guaranty. May's present contention is that the trial court erroneously refused to submit to the jury a disputed question of fact whether, in depositing these securities with the bank, May authorized their use as security for his guaranty. But here again, the instrument

of guaranty itself is controlling. It contains the following provision:

> "As security for the obligations of the undersigned hereunder, the undersigned hereby pledge(s) to the Bank and give(s) it a general lien upon . . . all money, negotiable instruments, commercial paper, notes, bonds, stocks, credits and choses in action, or any interest in any thereof, and any other property, rights, and interest, of the undersigned, or any evidence thereof, which have been or at any time shall be delivered to or otherwise come into the possession or custody or under the control of the Bank . . . and, in the event of a default hereunder, the Bank . . . may sell or cause to be sold . . . all or any of such security, . . . without demand of performance or notice of intention to sell or of time or place of sale. . . ."

In the light of this provision it does not matter whether particularized authorization was given for the securities which Chase sold.

Finally, appellant's argument that the bank had to prove its reliance on the guaranty is unsound. This is a suit on a contract. It appears on the face of the guaranty that the exchange bargained for was the making of loans by the bank to States Grain Corporation in exchange for May's promise to be responsible for any default by the borrower. Having received what he bargained for, the lending of money to the corporation, May cannot insist that the bank prove more.

Our conclusion that the guaranty covered loans made to the corporation without security makes it unnecessary for us to consider contentions of the appellant concerning the way in which the bank determined the amount of collateral to be required of the borrower from time to time.

The judgment will be affirmed.